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Analysis of the enforcement clauses in the first draft of the Employment Rights Bill: Working Paper

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November 2024

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1. Introduction: purpose of this paper

1.1 NTU's Work, informalisation and Place (WIP) Research Centre's has written this working paper to review the enforcement aspects of the new Employment Rights Bill. Our research explores the role of enforcement and regulation on labour with a specific focus on how place, work and informalisation intersect. Based on our expertise we were commissioned by the Trade Unions Congress to make recommendations for them on the role of the Fair Work Agency (FWA) ed. That report "Expand, Resource and Enforce Recommendations for the development and remit of a Single Enforcement Body", (August 2024) sets out where we consider further powers and remits should be given to the FWA.

1.2 This paper continues WIP's analysis following the release of the employment rights bill. The specific purpose of this paper is to provide an assessment of potential gaps and issues in the current draft of the enforcement clauses of the Bill.

1.3 A summary of recommendations, stemming from the analysis presented in this paper, is provided at the end of this working paper and are clustered around jurisdictional and delegation powers, meanings of enforcement officer, powers of entry, labour market enforcement undertakings, other forms of civil penalties and powers related to information exchange.

2. Focus of this paper

2.1 This paper focuses on the following areas:

- Jurisdictional and delegation issues
- Meaning of Enforcement Officer
- Powers of entry
- Labour Market Enforcement Undertakings
- Other forms of civil penalties that may be enabled
- Information exchange powers

2.2 Each section examines potential issues, or errors, that we think the current draft presents. We do not know what is in the mind of the legal draughtsperson who produced the draft but have reviewed existing supporting documentation produced to accompany the Bill to seek such clarification. Our analysis below is therefore based on what can be discerned from those documents, and assumptions where further explanation does not exist. Further clarification may be required, which may address some of the issues raised below.

2.3 Text in bold below highlights actions we think should be taken following on from the rational that is presented under the individual issue headings.

3. Recent publications and relevance

3.1 Recent publications support the argument that the FWA ought to be provided with additional powers and sanctions. We do not know what shape government may consider,

though note the current draft raises concerns, but cite the following documents to support the arguments we also set out in our report for the TUC.

3.2 On 16/10/24 the House of Lords Modern Slavery Act 2015 Committee issued the findings of its report: "The Modern Slavery Act 2015: becoming world-leading again". Encouragingly, it recommended that:

> "109. The current fragmentation of the UK's labour market enforcement system makes it difficult for the continuum of exploitation to be addressed before cases of modern slavery develop. ***The lack of an even approach across sectors makes it difficult*** to address the patterns of modern slavery when they arise, as shown by the recent increase in exploitation in the care sector.
>
> 110. The Government should establish an arms-length Single Enforcement Body to ensure stronger compliance with relevant labour rights and standards. As a minimum, the Single Enforcement Body should act as a single point of contact for labour exploitation across all sectors."
> (emphasis added)

3.3 On 18/10/24 the Centre for Social Justice issued its report "At what cost? Exploring the impact of forced labour in the UK", which, at Recommendation 3, included:

> "To prevent forced and compulsory labour and the conditions that allow it to flourish and to strengthen the response to it, the proposed Fair Work Agency must:
>
> - Have resources, capacity and a strategy to conduct more inspections and enforcement action, both proactive and reactive, at all levels along the labour exploitation continuum. This should include capacity for financial investigation and an uplift in the number of labour inspectors to reach ILO recommended levels.
>
> (…)
>
> - ***Have powers to issue penalties and engage with employers to remedy breaches across all sectors of the economy***, including retaining the powers of the Employment Agency Standards Inspectorate and the HMRC NMW team to recover unpaid wages or money owed to temporary workers and unlawful fees charged to workers"
>
> (emphasis added)

3.4 On the 18/10/24 the Government published a set of factsheets in relation to the contents of the Bill. This included one specifically on the Fair Work Agency. This fact sheet stated:

> "The bill confers a single set of powers to investigate and take action against businesses that do not comply with the law. These powers are based on powers of the existing enforcement bodies. ***Some additional enforcement powers will be added during bill passage***. This will include powers to issue civil penalties and to order employers to compensate workers, based on existing powers in the National Minimum Wage Act 1998."
> (emphasis added)

3.5 Aside from potential future consultations on any widening of the scope of the FWA, or its powers and sanctions, it is important to assess whether the current draft Bill would deliver existing remits, improve them, or in any way, have present new risks. This is necessary to ensure improved understanding for stakeholders. It should also assist identification of potential errors, or unintended consequences potentially created by the legislative drafting (for example, see para 8.3 below), to enable any necessary proposals for amendments to be made as soon as possible.

4. Legislation and related guidance examined

4.1 This paper is specifically focused on examining the proposed enforcement powers that the FWA will operate, as set out in the current draft of the Employment Rights Bill. It has therefore considered Part 5, clauses 72 to 112, and Schedules 4, 5 and 6 of the Bill to assess whether we consider it may raise unintended consequences that may affect its ability to effectively police the labour market. In reviewing those parts of the Bill we have also considered the relevant enforcement related sections of the Explanatory notes, Parliamentary briefing, the Memorandum on ECHR compliance, and compared them to the preceding Acts (which are amended or omitted in part), existing Codes of Practice, and relevant criminal, immigration and health and safety legislation for comparison:

- Employment Agencies Act 1973
- National Minimum Wages Act 1998
- Gangmasters (Licensing) Act 2004
- Regulatory Enforcement and Sanctions Act 2008
- Modern Slavery Act 2015
- Immigration Act 2016
- Home Office/DBT (issued under BEIS) Labour market enforcement undertakings and orders: code of practice (2016), and
- Home Office Powers of Entry Code of Practice (issued under the Protection of Freedoms Act 2012.)

5. Jurisdiction and delegation issues

5.1 Table 1, page 9, of the original 2019 SEB consultation set out the differing jurisdictional authority that each of the candidate bodies operated. This has now been included in the impact assessment on the creation of the FWA (page 15). It is clear that for serious offending the FWA will have a continuing responsibility for submitting appropriate cases for prosecution to the relevant prosecuting authority for England and Wales or the devolved administrations[1]. The draft of the Bill consequently raises some jurisdictional or delegation issues that require clarification.

[1] Crown Prosecution Service for England and Wales; Procurator Fiscal for Scotland; and Public Prosecution Service for Northern Ireland

5.2 Clause 72(6) states: "Nothing in this section authorises the Secretary of State to bring proceedings in Scotland for an offence." It is unclear whether this is included simply to state that any proposed prosecution, in relation to offences occurring in Scotland within the FWA's remit, must be referred to the Procurator Fiscal. Neither the Explanatory notes to the Bill nor the Parliamentary briefing document shed further light on this point. If the restriction is greater than as suggested above it would create a limitation on the ability to appropriately prosecute serious offenders compared to the existing situation. **Clarification is required.**

5.3 Schedule 6 of the Bill amends Schedule 2 of the 2004 Act (which related to the functions of the GLAA in Northern Ireland) and brings the exercisable powers in Northern Ireland into the body of a (to be) amended 2004 Act. **This raises a question on whether it would be simpler to create an additional Schedule to the Bill, covering the powers in Northern Ireland, rather than retain amended parts of s16 of the 2004 Act, when the powers of the other bodies, from their original Acts, will be removed and replaced by a consolidated power of entry in the Bill**.

5.4 Clause 74 allows the Secretary of State to (a) delegate functions to other public bodies, (b) for officers of that body to be treated as if they are Enforcement Officers of the Fair Work Agency, and (c) to provide for payment to the body providing the delegated functions. These delegations would appear to enable the continuation of the National Minimum Wage team's current ability to purchase an investigation service from HMRC's Fraud Investigation Service (HMRC FIS), although an internal market process. However, there is a distinction between one part of HMRC purchasing an investigation service from another part of the same organisation, where the organisation has appropriate authority to investigate, compared to a situation where HMRC FIS may provide a service to FWA, to discharge its functions in relation to criminal investigation into national minimum wage offences.

5.5 HMRC FIS have the authority to investigate offences in England and Wales (where appropriate under their PACE authorisation), and under the relevant legislation in Scotland and Northern Ireland. This enables HMRC investigations for any offence within its remit to be undertaken throughout the UK. However, National Minimum Wage offences will not be within HMRC's remit when the FWA is created. Therefore, if the Secretary of State delegates the investigation of National Minimum Wage offences to HMRC FIS, where, for that task, as stated in clause 74(1)(b), they become FWA Enforcement Officers, it would appear to invalidate the authority to use HMRC powers on behalf of FWA. Whilst those HMRC officers may be trained and experienced in relation to National Minimum Wage offences it would not appear to remove the potential restriction on the ability of HMRC FIS officers to use HMRC powers.

5.6 Consequently, it does not appear that potentially seconded HMRC Officers could lawfully undertake such investigations if the FWA did not have an underpinning authority to conduct those criminal investigations into serious National Minimum Wage offences in all jurisdictions itself. The solution would be to ensure that is does have that authority, "future proofing" the FWA as it develops.

5.7 If the FWA intends to delegate National Minimum Wage offences to HMRC FIS to investigate, it would appear that the FWA must be given the same investigative authorities that HMRC currently possess. To address this issue clause 82 could be renamed "Powers of Enforcement Officers, with a sub-heading "England and Wales", followed by the existing text, then followed by the addition of, for example:

> "***Scotland***
> For provision enabling enforcement officers to exercise powers in Scotland in relation to the investigation of labour market offences, see section 23A in the Criminal Law (Consolidation) (Scotland) Act 1995 (for production orders and search warrants), the Criminal Procedure (Scotland) Act 1995, and the Criminal Justice (Scotland) Act 2016 (consequential provisions) Order 2018, in respect of arrest powers.
>
> ***Northern Ireland***
> For provision enabling enforcement officers to exercise powers in Northern Ireland in relation to the investigation of labour market offences, see section 85 in the Police and Criminal Evidence (Northern Ireland) Order 1989."

5.8 Providing the FWA with the authority to the use of powers in the PACE (NI) Order 1989, even if then delegated to HMRC FIS might have other longer-term benefits. It might remove the need to retain s26A of that Order in the 2004 Act in relation to (currently GLAA) activity in Northern Ireland. Section 26A relates to a citizen's power of arrest. The Bill's Schedule 6 amendments envisage references to s26A in the 2004 Act being moved into section 14 from Schedule 2 of the 2004 Act. The amendment to the 2004 Act would also, remove s24A PACE (the equivalent power in England and Wales) from section14. This would be a simplification because it is effectively redundant due to the formal arrest powers now operated, as authorised by s114B of PACE (which will continue as specified by clause 82 of the Bill). If FWA was given the authority to exercise the powers in PACE (NI) Order 1989, like HMRC are currently able to do, it would enable access to the full s26 power of arrest in that NI Order (equivalent to the s24 PACE powers currently exercisable by the GLAA's LAPOs). This would assist future alignment of powers throughout the UK, and potentially simplify further amendments, rather than retain amended elements of the 2004 Act, as currently proposed in the draft Bill.

6. Meaning of Enforcement Officer

6.1 Clause 72 establishes that FWA Officers will be termed Enforcement Officers. Clause 82 refers to Enforcement Officers utilising the Police and Criminal Evidence (PACE) Act 1984 powers enabled through s114B of that Act. Schedule 6, Part 2, "Other Consequential Amendments", paragraph 67, of the Bill sets out the amendments to s114B, replacing the term "Labour Abuse Prevention Officer" (LAPOs) with Enforcement Officer throughout.

6.2 Although not included in Schedule 6 there will need to be replacement/amendment of Statutory Instruments 520 "The Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017", and 521 "The Gangmasters and Labour Abuse Authority (Complaints and Misconduct) Regulations 2017", to refer to FWA

Enforcement Officers empowered under s114B of PACE. However, other safeguards will also be required in the appropriate use of the correct enforcement powers dependant on the circumstances in which they are used.

6.3 Other amendments in Schedule 6 remove sections (A1) from sections 16 and 17 from the 2004 Act, and the removal of the EAS and NMW inspection powers (s9 of the 1973 Act; s14 of the 1998 Act) consequentially removing section (A1) from each of those Acts. Schedule 6 also removes the term compliance Officer from s16 of the 2004 Act.

6.4 Section (A1) was introduced to the sections of the aforementioned Acts through amendments from the Immigration Act (IA) 2016. The purpose of section (A1) was to make clear that those officers designated as Labour Abuse Prevention Officers (LAPOs), conducting investigations in England and Wales under PACE, could not use the civil inspection powers contained in the 1973 (s9), 1998 (s14), and 2004 (s16) Acts as a method of securing evidence. To do so would be an unlawful "fishing expedition", and an area of concern the Information Commissioner's Office (ICO) has previously commented on regarding different enforcement bodies use of powers (including when DWP's inspection powers were enhanced in 2000). Additionally, in the 2004 Act the (A1) restriction also extended to the pre-exiting s17 power of entry under warrants. However, as warrants would then be sought under s8 PACE by LAPOs s17 was effectively redundant in England and Wales, and effectively only of use in Scotland and Northern Ireland (see paras 7.18 – 7.20 below). Section (A1), where it was inserted, was designed as a safeguard against the misuse of powers.

6.5 In the FWA it will remain essential that ***if*** all officers are called Enforcement Officers, but have different levels of powers, dependant on allocated functions, that there is a clear distinction on what powers (civil or criminal) each type of Enforcement Officer can exercise in any particular operational setting. This is essential so that there is no risk of abuse of one set of powers to enable another purpose (i.e. using civil inspection powers to require production of documents to be used in an ongoing criminal investigation, which might result in self-incrimination, where a s8 PACE warrant should have been utilised). Furthermore, if all Enforcement Officers receive comprehensive training so that they are all capable of exercising all the powers available to the FWA, how, and when they may switch from one set of powers to another is critical, to avoid the abuse of use of powers. There is a risk that if there are complaints or legal challenges to the irregular operational use of specific powers it could undermine or prevent the sustainability of sanctions or prosecutions that result from such action (see also para. 7.13 below). By comparison, National Crime Agency (NCA) officers that are designated to use police, customs, and immigration powers can use all of those powers, and not limited to one or the other (see section 10 and Schedule 5 of the Crime and Courts Act 2013). However, designated NCA officers are using criminal investigative powers in all cases, and there is no potential mix with any civil powers that could cause similar complications to the sustainability of any enforcement action Therefore, the NCA exercise off powers is simpler than that potentially facing the FWA, and as addressed by the GLAA when the LAPO role and powers were first introduced.

6.6 Clause 95(2) of the Bill sets out the requirement for a FWA Enforcement Officer to "produce identification showing that the person is authorised to exercise that function."

The extension of the GLAA's LAPO powers from the 2016 Act, and its distinct compliance (civil inspection) team, focused on licence application and maintenance, meant that it had Compliance Officers, Enforcement Officers, and LAPOs, each with distinct powers, or the authority to use specific powers under specific designation at specific times. This required clarity in terms of what functions a GLAA officer was undertaking, and under what powers, when producing confirmation of his/her identity on entering premises. This was to ensure that there was no risk of misuse of powers for the wrong purpose or misleading those responsible for the premises entered.

6.7 It should be noted that cases of misconduct by an FWA Enforcement Officer exercising PACE powers under s114B will be under the authority of the Independent Office for Police Conduct (IOPC). Whereas complaints about the use of other powers by FWA Enforcement Officers could be made to the Parliamentary and Health Service Ombudsman. If situations arises where a FWA Enforcement Officer irregularly used certain powers to secure evidence to justify the subsequent use of PACE powers complaints might arise with both oversight bodies, and challenge whether the FWA should have specific powers. To protect the proper use of powers exercised by Enforcement Officers it is essential that their authorised role, in any situation, is clear in terms of identification, and which powers may be operated, together with an understanding and training on when certain powers cannot be used.

6.8 To reinforce the clarity of the role and function of differently empowered officers the GLAA also produced its non-statutory "Code of Practice on compliance, enforcement, labour market and modern slavery investigations". This document, and its previous iterations, was based on the model developed by DWP for its own revised powers of entry, introduced after 2000, with the current iteration produced in 2008: "Obtaining information from employers, contractors, the self-employed, pension schemes and licensing authorities: A guide to the powers of Authorised Officers, and their limitations". In turn, the concept for the DWP Code was based on the models in use by HMRC, in their Codes 8 and 9. A similar approach was also implemented by the Security Industry Authority, in their "ENFORCEMENT: What to expect from the SIA" guide. The development of such codes of practice are good practice models. They support clarity on the role and powers that an officer is operating under. They also reduce the potential for unnecessary obstruction and complaint. A similar approach is considered to be beneficial to the FWA, given its different powers. Furthermore, as in the GLAA Code (see para. 3.9 of that Code), the text of a Code can place beyond doubt the ability to undertake un-notified visits, where appropriate, which appears to be envisaged in the text of clause 79(3) of the Bill. A Code could also provide clarity on how other non-labour market offences would be handled when they come to light (i.e. referral to the police, and the potential for joint investigations), and also the inter-relation with other better regulation issues.

6.9 It is therefore suggested that a similar approach should be adopted by the FWA. As a minimum this could be a non-statutory Code (as in the case of the GLAA). However, it could be put on a statutory footing by future proposed amendments to the Bill.

6.10 This might also benefit from a Schedule addition to set out clearly when a FWA Enforcement Officer operating under clause 82 cannot operate under the powers in clauses 78-81.

6.11 This could additionally ensure that the extent to which Enforcement Officers have to demonstrate, and document, consideration of the Department for Business and Trade's "Duty of Growth" Code requirements, in relation to the different powers they may exercise, or the application of discretion not to consider such requirements in appropriate, defined, circumstances, is explicit.

7. Powers of entry

7.1 Civil powers of entry currently exist in section 9 of the Employment Agencies Act 1973, section 14 of the National Minimum Wage Act 1998, and section 16 of the Gangmasters (Licensing) Act 2004. In each case the powers of entry are phrased to ***require*** someone who is inspected to ***furnish*** the inspector with documents, which they can take away (s9(1A), s14(1)(b), and s16(1)(b) respectively), where a refusal would constitute obstruction, and an offence (s9(3), s31(5), and s18 respectively). Schedule 6 of the Bill revokes the current EAS and NMW powers, at paragraphs 3, and 19. Whilst paragraph 41 of that schedule only partially amends s16 of the GLAA's power of entry, removing its use in England, Wales, and Scotland, and focusing it, following amendment to the 2004 Act, on Northern Ireland.

7.2 It therefore appears that clauses 78 to 81 of the current Bill almost provides a consolidated power of entry for FWA officers. This would appear to cover NMW inspection in Northern Ireland, but in relation to Gangmaster related inspection powers of entry will continue to be operated through the amended s16 of the 2004 Act. Whilst consolidation of a power of entry (aside from the Northern Ireland issues, see below) is a positive step, the major concern on powers of entry relates to clause 79 and use of the term "seize".

Use of the term Seize

7.3 Clause 79 uses the term "seize". It is not defined in the context of this act, and its normal definition, and its appearance in other legislation relate to a criminal investigation power to seize. Its use here therefore appears incorrect, and may give rise to misinterpretation and misuse, and does not appear to be the intention within that civil inspection power. Clause 79(2) covers the power to ***require*** an inspected person to produce documentation specified. Neither the "Explanatory notes" or the "Parliamentary briefing" provide further light on why the term "seize" is used here when it was not used in the existing powers of entry used by EAS, NMW or GLAA (i.e. Powers of entry without warrant). As there is no alternative meaning specified the use of the term would imply its use in the ordinary, dictionary, sense of the word: "take hold of forcibly"; take possession of by warrant or legal right". The "European Convention on Human Rights Memorandum" in respect of the Bill (paragraphs 98 to 105) does refer to the use of "seize" in clause 79. It states that the powers are compliant with convention Article 8(2) right to privacy. Nonetheless, it does not explain why the term "seize" has been used where previously (currently) in other non-warranted powers of entry, it is not used. Consequently, if "seize" is used in this context, in what appears to be the consolidated inspection powers, it could lead to forced seizure of information that incriminates an individual, rather than appropriate criminal investigation under, for example, PACE, with related safeguards. This

may require further examination of whether, as drafted, clause 79 is completely compatible with Article 8(2).

7.4 The original Acts (1973, 1998, and 2004) allowed relevant inspectors to take "required" documentation that had been "furnished" away for examination; they do not use the term "seize". Comparatively, nor does the Security Industry Authority (SIA) have such power in its powers of entry. This distinction is further illustrated in the proposed extensions of the remit and powers of the SIA, in the draft Terrorism (Protection of Premises) Bill. In Schedule 3 "Investigatory Powers" of that Bill, at paragraph 4(1), additional entry powers to require production of documents, take copies, etc, in relation to premises specified in that Bill is provided, These clearly do not allow seizure because it is also proposed to provide a specific power of entry under warrant (paragraph 5), which (in paragraph 6(3)(b)) allow for seizure (analogous to the non-PACE warrant that was introduced for the GLAA in section 17 of the 2004 Act). Furthermore, where DWP exercise power of entry to seek evidence from employers their powers equally do not use seize (see 109C(3)(c)). Clause 81 covers retention of documents for so long as necessary. Therefore, these sections allow documents to be removed from premises, like the powers in the current Acts. Consequently, where there is a current requirement to produce something, it is not seized. Where there may be obstruction to the requirement to produce the documents there is an offence (as explained in para. 7.1 above), and an offence of obstruction is set out in clause 104(1)(b) of the Bill, which provides continuity with the existing situation. Obstruction, or the reasonable expectation of obstruction, could form the basis for seeking a warrant to enter and seize documentation. Technically, in future, for Gangmaster offences this could be done under clause 83 of the Bill in Scotland, using revised s17 2004 for Northern Ireland, and s8 PACE powers in England and Wales. for Northern Ireland, and s8 PACE powers in England and Wales.

7.5 The inclusion of ***seize*** in clause 79 may have been suggested to prevent any obstruction occurring. The consequence of this is that there is effectively a criminal power incorporated into a civil inspection power, but one that is not backed by a warrant. This appears to be inconsistent as a warrant is required in relation to gangmaster offences. Thus, FWA officers operating under clause 79 powers would have greater powers than those operating under clause 82 (PACE powers) or 83 (Gangmaster offences), both of which require different warrants for entry. Furthermore, seizing documentation that may then be used in a criminal investigation may be deemed an unlawful method of securing evidence. Consequently, it may constitute a manner that prevents an individual being protected from effectively self-incriminating themselves, despite the safeguard in clause 104(5). Therefore, the term "seize" should be revised, aligning the intention of the clause to the draft of existing powers of entry and the requirement to produce documentation.

7.6 Chapter 1 "powers of entry" in Part 3 "Protection of property from disproportionate enforcement action" of the Protection of Freedoms Act (PFA) 2012, cover requirements in relation to powers of entry, and the Code of Practice required by the Act. The chapter refers to "national authority" throughout, which is defined in section 46(1)(b) as "in any other case, a Minister of the Crown". Section 40 of that Act sets out the safeguards that must be considered when defining powers of entry. Sub-section (2) lists such safeguards including consideration of "(d) a requirement for a judicial or other authorisation before the power

may be exercised". Section 41 provides a national authority with a power to rewrite powers of entry, and section 43 requires consultation to occur where a power of entry is to be modified by Order. Whilst the Parliamentary process on the development of a new Bill should provide necessary scrutiny of powers it may not provide it to the extent envisaged in section 43. It may therefore require wider consultation with potentially affected bodies and stakeholders, with greater explanation provided. The need for clarity on the use of powers is emphasised in the PFA 2012 Code of Practice on powers of entry, which states:

14 Seizure of Property

14.1 In many cases powers to seize property will be subject to PACE Code B however where powers to seize property are subject to this Code the following considerations should apply. ***An authorised person may only seize property where such powers granting the right to seize objects or items are clearly set out in relevant legislation.*** The power of seizure will be determined by the relevant legislation, and this should be carried out to create minimal burden and distress to the occupier of the premises subject to the requirements of enforcing the legislation.
(emphasis added)

7.7. Furthermore, the above code paragraph confirms that seizure is considered a criminal investigative act, requiring powers under PACE, or separate legislation, such as s83 of the Bill, and the proposed amendments to s17 of the 2004 Act, and not therefore intertwined within a civil inspection power.

7.8 Use of the term "seize" appears in s19 of PACE, s50 of the Criminal Justice and Police (CJ&P) Act 2001, and 47C of the Proceeds of Crime Act (POCA) 2002. Section 19(1) PACE, section 50(1)(a) CJ&P, and section 47C(5D) POCA all use the phrase "lawfully on the premises". All of which relate to criminal and allied financial investigative powers.

7.9 Immigration legislation also enables seizure in relation to evidence in support of immigration offences, even where the offence is dealt with by civil penalty. Section 46 of the Immigration Act (IA) 2016 amended Schedule 2 of the Immigration Act 1971 inserting paragraph 15A "search of premises in connection with removal", where 15A(4) referred to seizure. Section 47(4) "search of premises in connection with the imposition of a penalty" of the 2016 Act refers to seizure. Thirdly, section 48(3) on "seizure and retention in relation to offences" provides for seizure in those circumstances. Each of those sections also use the phrase "lawfully on premises". However, the 2022 judicial review of the use of immigration powers to seize items inappropriately illustrates the risk of misuse of powers beyond their original intention. Furthermore, separately from Immigration enforcement bodies, the powers of entry of the Office of the Immigration Services Commissioner (OISC), a "Non-Departmental Public Body" (the same legal status as the GLAA) only has the power to enter and seize under a warrant. In each case the ability to seize is under powers related to the investigation of criminal offences.

7.10 Section 20 of the Health and Safety at Work Act (HSWA) 1974 details the powers of HSE Inspectors. Section 20(2)(i) allows HSE inspectors to take possession and remove any article of substance that may have caused, or be capable of causing, risk of injury. The word "seize" is not used in the phrasing of the legislation. However, HSE's guidance used the

phrase: "Seize and make harmless (by destruction if necessary) any article or substance which they have reasonable cause to believe is a cause of imminent danger of serious personal injury".

7.11 The use of seize, where it is identified above, relates to criminal investigation, immigration offences (where arrest may also occur), or in relation to dangerous items, and, in the case of immigration powers, has been subject to challenge. The term was not used in existing powers of entry available to EAS, NMW, or GLAA (except where the power of entry is under a warrant). The use of the term in relation to inspection activity, to confirm compliance with the law, and not as part of a pre-planned criminal investigation under an appropriate warrant, appears incorrect. If a FWA Enforcement Officer was lawfully on a premises under clause 79, but then seized something for which a warrant should be required, they would have misused other powers, and not continued to be lawfully on the premises, when doing something for which other powers were specifically created.

7.12 Where a document (in any physical or digital format)_is identified that needs to be seized, and which requires a warrant, advice previously obtained (in relation to the implementation of the LAPO powers) indicated that the officer would have to exit the premises, obtain a warrant (if they were empowered to exercise PACE powers as a Labour Abuse Prevention Officer), then return, entering with force if necessary. Whenever it is necessary to leave a premises there is a risk that the evidence may be destroyed. In s19(2)(b) PACE and s48(2)(b) IA this risk, for police and immigration officers, is mitigated by the authority to seize something if they have a reasonable belief "that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed." A similar justification is not present in the drafting of clause 79 but may require further consideration.

7.13 Therefore, the drafting of clause 79, and use of the term "seize" appears to create the potential risk of complaints of abuse of power. This could include using the inspection power as a "fishing expedition" to identify, then seize documents, to use in a continuing, and planned, criminal investigation. If correct, this could give rise to requests for judicial review on the basis that FWA Enforcement officers operating in this manner was "ultra vires". This could then also undermine the credibility of the organisation, as well as the sustainability of any sanction proposed, whether civil, or by criminal prosecution.

7.14 It should also be noted that if it is the intention that clause 79 does provide a power to seize, notwithstanding the view above that this appears an incorrect use of the term, it would only be in relation to items found on a premises, and not on a person. Whereas, for example, s50 CJ&P refers to seizure from a premises, s51 refers to seizure from a person where "(1)(a) a person carrying out a lawful search of any person finds something that he has reasonable grounds for believing may be or may contain something for which he is authorised to search". Furthermore, the current use of PACE by LAPOs (S.I 520, paragraph 11) amends s1 PACE to allow search and seizure by a constable where "the person to be searched has concealed on him material which might be evidence in relation to a labour market offence", and extending to a LAPO currently (through the addition of section (3A) "This section only gives a labour abuse prevention officer a power to search to the extent that is reasonably required for the purpose of discovering any such material."

7.15 Consequently, if a FWA Enforcement Officer was exercising powers under clause 79(2)(c) "to have access to, and check the operation of, any computer or other equipment used in connection with the processing or storage of any information or documents." they would not be able to seize it if that information was held on a USB or similar device in the pocket of a person present during entry into a premises. This would only be achieved using PACE powers in England and Wales. This further suggests that the use of the term "seize" is incorrect in clause 79(4) or that further clarification is necessary to explain the intention of the use of the term in the context of clause 79 powers.

7.16 Clarification on the use and insertion of "seize" within clause 79 is required to ensure that the drafted clause has not unintentionally mixed civil and criminal powers in a manner that would open FWA Enforcement Officers up to complaints of abuse of powers.

7.17 Further consideration should be given to how the risk of destruction of evidence can be managed where lawful seizure requires a warrant. Could this be addressed by a clause that stated: "An enforcement officer who has lawfully entered premises under these powers, but may not seize items, may lawfully remain on those premises to protect evidence from destruction, whilst a warrant is obtained to seize the evidence, which may be executed by a separate Enforcement Officer"?

Use of section 17 (2004) – Northern Ireland

7.18 Separately from civil powers of entry, the GLAA had a power under s17 of its Act, to request a warrant for entry, with force if required, to take possession (i.e. seize) any documents (s17(2)(c). This power was for use in criminal investigation, and applied throughout the UK, on application to the relevant jurisdiction's courts. Once the GLAA secured the use of s8 PACE powers they were used in England and Wales in preference to s17, where s17(A1) precluded the use of that section by LAPOs. Section 17 would only be relied upon, if necessary, in Scotland or Northern Ireland. One of the primary reasons why PACE would operationally be preferred, if both could be used, was because it allowed "search, seize, and sift at another location", whereas s17 was constrained to "search, sift on premises, and seize relevant documents".

7.19 As the FWA will retain the PACE powers in relation to labour market offences in England and Wales (clause 82) it would seem that the retention of s17 within the 2004 Act, through the manner in which it is amended in Schedule 6 of the Bill, is partially redundant except in the devolved administration of Northern Ireland. Clause 83 of the Bill replicates the content of s17 but only in respect of England and Wales, and Scotland.

7.20 For Northern Ireland paragraph 16 of Schedule 2 of the 2004 Act provided the equivalent authority to s17 to obtain a warrant in that jurisdiction. In relation to the power to obtain a warrant in Northern Ireland for gangmaster offences, paragraph 42 of Schedule 6 of the Bill removes references to England and Wales (amendment 42(2)), inserts new clause (4A) referring to Northern Ireland (amendment 42(4)) and removes reference to Scotland (amendment 42(5)). Therefore, s17 of the 2004 Act has been retained so that it separately covers Northern Ireland. Additionally, there are other amendments created by Schedule 6 to s14 and s15 of the 2004 Act, so that they only refer to Northern Ireland as well.

7.21 The retention of specific powers for Northern Ireland in the 2004 Act, rather than providing consolidated powers for the FWA within the Employment Rights Bill, appears disjointed. Unless there is a clear legal reason for it, could be simplified by consolidation into the Bill covering functions in Northern Ireland. Section 17 would potentially be redundant if the suggestion above (paragraphs 5.5-5.7), authorising FWA to use the same powers operated by HMRC in the devolved administrations was approved.

7.22 As an alternative to the retention of sections of the 2004 Act, amending them to only refer to Northern Ireland, and as originally all references to Northern Ireland were contained in Schedule 2 to the 2004 Act, consideration should be given to the incorporation of those sections within a Schedule to the Bill. If the reason for retention of the 2004 Act, as amended, relates to the issue of employment matters being a devolved issue consideration to obtaining an agreement for their inclusion in the Bill should be sought. This would be on the same basis that the operation of the 2004 Act in Northern Ireland could be covered in a Schedule to that Act.

7.23 The creation of clause 83, by obtaining a "non-PACE" warrant, enables seizure of documentation only in respect of gangmasters offences and investigations, and limited to England and Wales, and Scotland as explained above. However, use of s8 PACE in England and Wales would suggest that the new clause 84 would only be used in Scotland. **Further simplification could be considered instead of leaving the powers for Northern Ireland separately in the 2004 Act.**

8. Labour Market Enforcement Undertakings

8.1 The Bill Schedule 6, Part 2, paragraph 89, amends the Immigration Act (IA) 2016, removing sections 14-30, and 32-33, relating to the application of the labour market enforcement undertakings and orders process. These are replaced with clauses 84 to 94 and 102 (offence of non-compliance with an Order, previously set within s27 of the 2016 Act). Clauses following 102 cover the application to partnerships etc, originally set in sections 28 et seq IA, but which appear to have been set out in the Bill in this way as having a wider application that just to LMEU/Os, avoiding replication where this may also apply to other areas of labour market enforcement.

8.2 The deletion of s33 of the 2016 Act by Schedule 6 of the Bill removes the interpretation of the term "trigger offence". That interpretation explained that it had the meaning provided in section 14(4) of the 2016 Act, which Schedule 6 also removes. Section 14(4) IA established which offences, from those defined as labour market offences in s3(3) IA, were to be treated as offences for which LMEUs could be considered. Thus, the list of what is currently termed "trigger offences" are a sub-set of "labour market offences". Section 3(3)(d-f) defined offences under sections 1,2,4, and 30 of the Modern Slavery Act 2015 as labour market offences, but they are not trigger offences, and were not included in the list of offences in s14(4) of the 2016 Act due to their seriousness. A LMEU/Os cannot, and should not, be used for more severe modern slavery offences. This is further confirmed regarding the "trigger offence" definition within paragraph 7 of the Code of Practice on the use of LMEU/Os (the Code was originally required by s25 of the 2016 Act, which is also removed).

8.3 Throughout the revised text in the Bill relating to the LMEU/O (clauses 84 to 94) the term "trigger offence" has been replaced with "labour market offence". Clause 112 states that "labour market offence" covers those offences listed in Schedule 4 Part1; this includes the aforementioned Modern Slavery Act 2015 offences. It also includes legislation that will be administered by the FWA, but which does not constitute a criminal offence. The Human Rights Memorandum, which accompanied the Bill, at paragraph 13, relating to Article 5 rights, states: "13. The current regime established by the Immigration Act 2016 applies only to specified "trigger offences" relating to the national minimum wage, regulation of employment agencies and licensing of gangmasters. The Bill extends the scope of the regime and, consequently, the circumstances in which the offence of breaching an LMEO applies." This appears to be an unintended error, created by a potential desire for simplification, which is in ignorance of the difference between the two lists of labour market offences, and that non-offence related legislation is also included in Schedule 4, Part 1. The potential consequences that may be created, albeit hypothetically at this juncture, are:

(a) If a FWA Enforcement Officer, offers a LMEU in situations where there is a Modern Slavery Offence, for which consideration of prosecution is the appropriate sanction decision, or
(b) In a prosecution for a Modern Slavery Offence a defence lawyer asks the prosecution if the investigator considered offering a LMEU, and when told no argues a breach of process in the hope of the case being dropped on technical grounds (this scenario is based on a known situation where CPS dropped a prosecution because the defence argued that the investigator had not considered the growth duty [see paragraph 6.11 above] before considering whether prosecution was appropriate – a similar situation could arise here).
(c) A LMEU could be offered in relation to legislation listed in Schedule 4 (e.g. regarding penalties for non-payment of an Employment Tribunal award, for which a civil penalty can be levied), which is not a criminal offence. Consequently a LMEU cannot be offered as an alternative. Nor could a failure to comply lead to a Labour Market Enforcement Order, or a failure to comply with that lead to prosecution for a breach of an Order. In that situation the person will have been prosecuted for a matter that they could not have been prosecuted for, fundamentally contrary to their ECHR Article 7 rights.

8.4 A recognition of the distinction of what a "trigger offence" is, is still necessary and required, or at a minimum, the inclusion of text in clause 84 to state that it can be used for any labour market offence *except* in the circumstances where there is a potential s1,2,4, or 30 Modern Slavery Act 2015 offence, or where there is not an underpinning criminal offence that could otherwise result in a prosecution .

8.5 Section 25 of the 2016 Act required the production of a Code of Practice to control the use of LMEUs by the enforcement bodies, originally empowered in section 26 (i.e. EAS, NMW, GLAA). The Code of Practice was underpinned internally by standard operating procedures. The Code itself therefore provided clarity for those who may be subject to the process, and transparency over the safeguards on its use. The amendments created by

Schedule 6 remove all reference to the Code of Practice. This presents a risk for the future use of the LMEU process, and grounds for complaint, if misused or misunderstood.

8.6 Unless there is an intention to reintroduce the Code under planned Government amendments to the Bill this currently appears to be an oversight that would require future attention and amendment.

8.7 When the GLAA's remit was extended in 2016, it enabled it to investigate any labour market offences but limited to England and Wales. Consequently, it could consider whether a LMEU might be appropriate for any offences it was investigating (except for the aforementioned Modern Slavery offences). This meant that it could offer what were termed combination LMEUs, covering other offences than those in the Gangmasters (Licensing) Act 2004, but only insofar as they occurred in England and Wales (due to the territorial limitation of the PACE 1984 powers of LAPOs). Paragraph 15 of the LMEU/O Code refers to this ability.

8.8 As the LMEU process will be operated by FWA, covering the preceding legislative remits of EAS, NMW, and GLAA, it would appear, at first sight, that combined LMEUs could be considered, where multiple labour market offences are identified, in any jurisdiction that the FWA operates in. However, the GLAA was not authorised to use LMEUs in Northern Ireland, EAS do not operate there, but NMW could consider them in that devolved administrative jurisdiction currently. Furthermore, it is unclear whether the application of s114B PACE 1984 to FWA officers, which enabled the GLAA's potential wider role in the application of LMEU/O process, continues to restrict FWA officers to only be able to consider combined LMEU/Os in England and Wales.

8.9 Clarification of the ability of the FWA to utilise the combined LMEU/O process, where appropriate, and whether that is limited jurisdictionally to parts of the UK, should be set out in legislation, and supporting explanation within the continued existence of a Code of Practice on the operation of the LMEU/O process.

9. Other forms of civil penalties that may be enabled

9.1 The FWA factsheet states that: "Some additional enforcement powers will be added during bill passage. This will include powers to issue civil penalties and to order employers to compensate workers, based on existing powers in the National Minimum Wage Act 1998". This suggests that any additional sanctions will only be based on the NMW penalty regime. Future consultation should clarify whether the approach will address the issue raised in the SEB consultation government response (2021) that: "We will introduce new civil penalties for the breaches under the gangmasters licensing and employment agency standards regimes that result in wage arrears", (page 22). However, consideration of the available sanctions from the Regulatory Enforcement and Sanction Act 2008 , Part 3 Civil Sanctions, ought to be considered further. This requires confirmation that access to those sanctions will remain applicable.

9.2 Paragraph 82 of Schedule 6 of the Bill amends Schedule 5 of the 2008 Act, omitting a reference to the GLAA. The ability to consider access to the use of RESA sanctions in future would then be dependent on whether there is an ability for the Secretary of State to

exercise them, through FWA Enforcement Officers. Section 37 of the 2008 Act states that a person who is not defined as a "designated Regulator" (as the GLAA was), can be defined as a regulator for the purposes of access to the use of the civil sanctions, if they satisfy the requirements of s37(2). That requires there to be an enforcement function in relation to an offence contained in an Act passed before 2008, as listed in Schedule 6 of the 2008 Act.

9.3 Schedule 6 of the 2008 Act includes reference to the offences at sections 5(2), 6(2), and 10(2) of the Employment Agencies Act 1973. None of these offences were removed through the consequential amendments of Schedule 6 of the Bill. Therefore, it suggests that theoretically the use of RESA sanctions remains open for consideration under Secretary of State authority. However, the Gangmasters (Licensing) Act 2004 and the National Minimum Wage Act 1998, referencing the remaining offences in those Acts, would need to be added to Schedule 6 of RESA 2008.

9.4 Consideration should be given to enabling the future use of RESA sanctions, as potentially beneficial to the operation of the FWA. This should be facilitated by including additional amendments to the RESA 2008 Act, within Schedule 6 of the Bill, after paragraph 82. The amendment would be to Schedule 6 of RESA 2008 to include references to the 1998 and 2004 Acts referred to above.

9.5 Another compliance pressure could be exercised by requiring (for licence applicants/holders) evidence of tax compliance, and or offenders of any act, a requirement to pay assessed unpaid tax, as an additional requirement to any penalty. There is a model for this approach, regarding licensing, in the section 24 ("tax clearance") of the Republic of Ireland's Private Security Services Act 2004), which, in the UK, could refer to the relevant tax compliance legislation.

10. Information exchange powers

10.1 Bill clauses 98-101 and Schedule 5 cover information sharing powers with other enforcement bodies, and related safeguards (such as s101 regarding onward disclosure of HMRC information, which maintains the control originally set out in s19(3) of the 2004 Act).

10.2 Clause 102 provides for circumstances in which information may be provided to, or received from, the security services, with similar controls over the onward disclosure of such information to other bodies. Although there has not been, to my knowledge, situations wherein such information was previously referred, or received, except for rare referral to a police Counter-Terrorist Unit, this would appear to cater for the potential future situation, providing a belt and braces approach.

10.3 However, given the apparent need to include the text of s102, it appears that similar forethought may not have been applied to Schedule 5 (whilst noting that s98(6) empowers the Secretary of State to amend Schedule 5, therefore potentially enabling future additions). Furthermore, the text of Schedule 5 appears to have been drafted in line with the FWA factsheet comment that: "These powers are based on powers of the existing enforcement bodies."

10.4 The Immigration Act 2016 introduced amendments to the Employment Agencies Act 1973, introducing clauses (ix) and (x) into section 9(4) of the 1973 Act. These clauses related to information exchange between EAS and the Pensions Regulator and the Care Quality Commission respectively. Schedule 5 includes these two regulators, replicating the aforementioned amendments from 2016. (NB: It is assumed that the other entries under "*Health Bodies*" in Schedule 5 are intended to cover all the equivalent bodies to CQC in the devolved administrations.

10.5 The omission is the Security Industry Authority (SIA). This was not covered in the 2016 Act amendments to the 1973 Act, but it is a licensing, and effectively, specialist labour market inspectorate. This omission is clear when recent joint operational activity by the SIA is considered. Operation Empower is an operational name for an SIA project working closely with HMRC (NMW), and Immigration, with a focus on tackling labour exploitation in the security industry. Close operational cooperation on exercises such as this requires the lawful exchange of information, and intelligence analysis, to prepare for any joint activities to be undertaken.

10.6 Consequently, the SIA is considered to be an omission that ought to be added to Schedule 5 of the Bill under one of the first two sub-headings, whichever is considered most appropriate.

11. Other Issues

11.1 Other areas where it is considered the FWA's remit, or powers should be enhanced are set out in the NTU's report: "Expand, Resource and Enforce - Recommendations for the development and remit of a Single Enforcement Body", commissioned by the TUC. It is hoped that in the passage of the bill, and future amendments, these issues will be considered, which we consider, if accepted, will result in an improved and flexible enforcement capability in the FWA's functions.

12. Recommendations: Issues for review

Jurisdictional and delegation issues

- Clarify Clause 72(6): "Nothing in this section authorises the Secretary of State to bring proceedings in Scotland for an offence." - what limitations is this creating in relation to the existing investigation and submission for prosecution to the Procurator Fiscal Service of the current functions of the candidate bodies in Scotland?
- Clause 74 – delegation: If it intends that this would allow NMW criminal investigation to be delegated to designated officers in HMRC, as currently, the legislation should ensure that the FWA has the appropriate investigative authority in Scotland and Northern Ireland to underpin that activity (i.e. the legislation HMRC operate under as detailed here)

- Clause 82 – amend to cover the authority for investigation in Scotland and Northern Ireland
- Clause 83 – If Clause 82 is amended to provide consistent operating authority throughout the UK this clause becomes redundant. As it only relates to England, Wales, and Scotland, it results in the retention of a version of this clause in an amended and reduced version of the Gangmasters (Licensing) Act 2004, which could be further simplified.

Meaning of Enforcement Officer

- Clause 72/82: Clause 72 defines all FWA officers as Enforcement Officers; Clause 82 provides for the use of PACE powers by FWA Enforcement Officers in England and Wales. As FWA will have civil inspection and criminal investigation powers not all FWA officers will be able to use all the same powers, or at the same time. Safeguards are required to avoid abuse of powers and be clear on which Enforcement Officers can exercise which powers in which circumstances. A public code of practice would provide clarity on such situations, which could be implemented as a statutory Code

Powers of entry

- Clause 79 – use of the term "seizure": This clause aims to consolidate the existing powers of entry of the candidate bodies. Those powers are civil inspection powers not criminal, unlike the powers in clause 82 and 83. The use of "seize" is incorrect as you cannot seize documents under a civil inspection power, otherwise other powers, and obstruction offences would not be required. The clause needs to be re-worded to avoid the risk of abuse of powers.
- Schedule 6 amended the 2004 Act and amends the s17 power of entry under warrant to apply to Northern Ireland. This could be removed if clauses 82 and 83 were amended as above, to consolidate clarity on powers of entry under warrant

Labour Market Enforcement Undertakings – clauses 84-94

- The incorporation of an amended version of the sections from the 2016 Act on the LMEU regime remove the requirement for a code of practice governing the operation of the regime and remove the term "trigger offence". Not all "labour market offences" are "trigger offences". LMEUs cannot be used for modern slavery offences of forced labour, or for other areas of legislation under FWA responsibility if there is not an underpinning criminal offence. That is why there were two terms. Therefore
    - The term "trigger offence" should be reintroduced, or other method of legislative clarification applied
    - The requirement for a statutory code of practice should be re-introduced, or clarification provide how this may be achieved through other guidance planned

- Schedule 4 of the Bill should also differentiate those areas of legislation in its scope that enable criminal investigation of criminal offences from other legislation that is regulatory, and civil in nature, for which LMEUs cannot be considered as an alternative to prosecution (which cannot occur).

Other forms of civil penalties that may be enabled

- Paragraph 82 of Schedule 6 of the Bill amends Schedule 5 of the 2008 Act- further amendment should be made to ensure the ability of the FWA to access and use RESA sanctions is enabled, and "future proofing" the Bill, so that if it is considered justified in future they can be switched on through secondary legislation.

Information exchange powers

- Clause 98/Schedule 5 – disclosure of information – Although the Secretary of State may amend Schedule 5 by Order it ought to be as comprehensive as possible from the outset, to enable effective collaborative investigation and information sharing. All existing regulators with responsibilities within the labour market should be included. The Security Industry Authority is an omission and should be included by amendment to the Schedule.

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November 2024